No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

Arthur W. Harrigan, Jr.
Counsel of Record
Tyler L. Farmer
Kristin E. Ballinger
John C. Burzynski
Harrigan Leyh Farmer
& Thomsen LLP
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700
arthurh@harriganleyh.com

David S. Hawkins
General Counsel
Upper Skagit Indian Tribe
25944 Community Pl. Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com

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INTRODUCTION

The question raised by the Lundgrens below, answered by the Washington Supreme Court, and accepted for review by this Court is whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it." Pet. i. Apparently recognizing that the answer to this question is no, the Lundgrens have now abandoned that argument, urging the Court instead to recognize a new "immovable property" exception that would erase tribal sovereign immunity for actions challenging tribal ownership of property held in fee within a state's territory.

This new argument was not raised below or in opposition to the petition for writ of certiorari and is waived. But advancing this argument underscores the fallacy of the one abandoned: the Lundgrens had claimed that sovereign immunity did not apply to their *in rem* quiet title action because the action was against property, not against the sovereign. In fact, the Lundgrens' action directly attacked a sovereign's interest in property—its recorded title. Recognizing that fatal flaw, the new argument concedes that immunity normally bars lawsuits attacking a sovereign's interest in property.

Given that the Lundgrens admit that their "immovable property" exception does not apply to the federal government and has never been applied to tribes, the Court has already answered the argument

the Lundgrens raise: "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2037 (2014).

The Lundgrens' analogy to foreign nations and to states shows the opposite of the proposition they advance. Foreign nations' narrower immunity from suit reflects choices made by the *political* branches—Congress and the Executive. States' narrower immunity reflects mutual waiver and the nature of federalism.

This Court has repeatedly recognized that Indian tribes are "domestic dependent nations" of the federal government subject to the plenary power of Congress, in the federal government's guardianship and "tutelage." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (citations omitted). The Lundgrens cite no case, and the Tribe is not aware of one, where this Court has held that tribes lack immunity from suit in circumstances where the federal government, in a tribe's position and absent waiver, would be immune.

The Court should reject the Lundgrens' invitation to sidestep the political branches and narrow sovereign immunity by judicial action where Congress has not acted and the Executive agrees that tribal sovereign immunity applies.

ARGUMENT

I. The Court Should Decline to Consider the Lundgrens' New Argument for an Immovable Property Exception.

The Lundgrens advance an immovable property exception to tribal sovereign immunity for the first time in their merits brief. The question of the applicability of that exception to tribes has never been raised in this litigation: it was not argued to, or ruled on by, the Washington courts; nor was it identified in the petition for writ of certiorari, opposition, or reply.

The Court should decline to consider this new argument. Under Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *Id.*; *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]" (alterations in original) (citation omitted)). Under Rule 15.2, any objection to the question presented is "waived unless called to the Court's attention in the brief in opposition." *Id.* Accordingly, arguments not "decided below" and "omitted" from the opposition to the petition for the writ of certiorari "are normally considered waived." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128–29 (2011). The Lundgrens have consistently argued that *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), makes the *in rem* nature of their action dispositive, rendering sovereign immunity irrelevant. The

Washington courts decided the case on that basis, Joint Appendix (JA) 71–72, 105–108, and the Lundgrens' opposition to the petition for writ of certiorari defended the decision below based on *in rem* jurisdiction and *Yakima*, raising no argument that the fact that the property was "immovable" warranted its own exception.

This new argument falls outside the scope of the question presented because the two are not logically congruent: the new argument is both broader and narrower than their discarded argument. It is broader because actions regarding immovable property need not be *in rem* proceedings. *E.g.*, Resp. 12 ("A sovereign may not assert immunity to bar an action in the courts of another sovereign involving interests in land that it owns within the forum sovereign's territory."). It is narrower because it applies only to immovable property, not to all actions that are *in rem*. Nor is addressing the Lundgrens' "immovable property" exception necessary to the "intelligent resolution of the question presented." Resp. 22 (citation omitted). The Court can answer whether *in rem* jurisdiction and *Yakima* render tribal sovereign immunity inapplicable, leaving for another case arguments that a separate "immovable property" exception would allow suit.

The new argument also raises complex new questions about the purpose, history, and limits of tribal, state, and foreign sovereignty, foreign affairs, and the common law dating to the 18th century, questions that the Tribe has been forced, because of its untimely assertion, to answer within the time and

page limit constraints of its reply. Neither the parties nor the Court are well served by the addition of a new issue that has not been fully and fairly litigated.

The Court has previously refused to consider arguments outside the scope of the question presented. *See, e.g., OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397–98 (2015) (refusing to evaluate sovereign immunity on a new basis, holding, "[t]hat argument was never presented to any lower court and is therefore forfeited"); *see also Lewis v. Clarke*, 137 S. Ct. 1285, 1292 n.2 (2017). The Lundgrens waived their new argument by failing to raise it earlier and the Court should not consider it now.

II. The Court Should Continue to Defer to Congress to Define the Extent and Limits of Tribal Sovereign Immunity.

On the merits, the Lundgrens' request for a common-law narrowing of immunity is ill-founded. "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037.

A. The Political Branches, Not the Courts, Have Determined Whether to Except Immovable Property from Foreign Sovereign Immunity.

This Court has previously noted that, "[i]n considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Foreign nations' immunity has narrowed over time not by actions of the Judiciary, but instead because Congress and the Executive narrowed the broad rule of immunity that this Court had previously recognized, and courts deferred to that choice:

> [F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); *see also Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882))).

The development of the immovable property exception reflects this deference. Prior to passage of the Foreign Sovereign Immunities Act (FSIA) in 1976, courts looked to the State Department to determine

whether immunity should be granted. *Verlinden B.V.*, 461 U.S. at 486–88. "Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.* at 486. After the State Department adopted the restrictive theory of foreign sovereign immunity in 1952, "its application proved troublesome." *Id.* at 487. In enacting the FSIA, Congress substituted its political judgment for the State Department's. The FSIA established a default rule of foreign sovereign immunity subject to enumerated exceptions, including an exception for suits "in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. §§ 1604, 1605(a)(4).

The Court has grounded its deference to the political branches on their unique institutional advantages, deference which applies to both foreign and tribal immunity:

> In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area.

Kiowa, 523 U.S. at 759. That is, the Court recognized the default rule of tribal sovereign immunity and deferred to Congress to determine what exceptions, if any, should apply. Just as it was the domain of the political branches to develop and refine exceptions to foreign sovereign immunity (first by

recommendations by the State Department, later by congressional action), so too should Congress take the lead in any consideration of the wisdom and practicalities of an immovable property exception to tribes' sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2039 ("[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty.").

The Lundgrens incorrectly contend that a common-law immovable property exception to foreign sovereign immunity was uniformly recognized since the 18th century. Resp. 13–15. But, as just described, decisions about the application and scope of foreign nation immunity were deemed political questions entrusted to the State Department, not judicial questions answered by the common law. *Verlinden B.V.*, 461 U.S. at 486–87; *Knocklong Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285, 286–87 (Nassau Cty. Ct. 1957) (recognizing sovereign immunity in an action challenging title, after receiving a suggestion of immunity from the State Department). The Tribe has found no pre-FSIA decision by a United States court denying immunity to a foreign sovereign based on a common law immovable property exception. *See* Fredric A. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale J. Int'l L. 1, 33 (1976) (stating that, prior to the FSIA, "[n]o State Department or judicial denial of immunity appears to have been expressly based on" the immovable property exception to foreign sovereign immunity).

Nor does it appear that the Lundgrens have found such a case, citing only *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See* Resp. Brief 13–15. The Court referenced in passing the possibility of an exception to immunity stating, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction." *The Schooner Exchange*, 11 U.S. at 145. But the Court stressed it was not "indicating any opinion on this question," *id.*, nor does the opinion indicate whether the resolution of the question would lie with the political branches or the courts.

Even outside the United States, the immovable property exception appears not to have been uniformly established at common law. *Compare* Resp. 13–15 *with* H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 (1951) (whether there is no immunity with respect to actions relating to immovable property "is not altogether free of doubt—it is significant that there is no English decision directly supporting this exception from the principle of immunity"), *and* Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* 22 (Gordon J. Laing trans. 1946) (1744) ("In regard to the property of foreign princes there is, however, no unanimity.").

The Lundgrens ask the Court to draw a lesson from the immunity of foreign nations. But the only clear lesson is that the Court established a baseline of immunity from suit, deferring to the political branches to narrow the immunity as necessary.

Applying that lesson here merely reaffirms what the Court held in *Bay Mills*: "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." 134 S. Ct. at 2037.

B. Any Narrowing of Tribal Sovereign Immunity Should Come from Congress.

An "immovable property" exception to tribal sovereign immunity would substantially undermine tribal sovereignty. The Tribe does not ask the Court to weigh these harms against those the Lundgrens claim. Rather, the Tribe identifies some of the harms to illustrate the wisdom of deferring these considerations to Congress.

The Lundgrens sued the Tribe, stating in their complaint that the Tribe "is the record title holder" of the property. JA 12. They sued for the express purpose of "reforming" the "legal descriptions of . . . [the Tribe's] propert[y]" and "terminating" the Tribe's claim to it. JA 15; *see also* Clerk's Papers (CP) 17 (county record identifying Upper Skagit Indian Tribe as "owner" of parcel). The Tribe, like any sovereign whose ownership of property is claimed by another, was forced to choose among invoking sovereign immunity against an action attacking its interest in property (in this case recorded title), waiving immunity and thus bearing the costs of defending against this claim on the merits, forfeiting its right to the property, or paying a settlement. Without sovereign immunity, each option diminishes tribal treasuries and limits the resources tribes can spend to provide services and benefits to its members. And

successful claims asserting ownership of tribal land will erode tribal territory and reduce the cultural, governmental, and economic resources those lands provided. Sovereign immunity is designed to avoid these harms. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("sovereign immunity protects" against the "specific indignity" of the sovereign's "being haled into court without its consent" which "occurs . . . when (for example) the object of the suit . . . is to . . . acquire [the sovereign's] lands"). Pursuant to *Bay Mills*, the question of when these harms should be borne by the tribes is for Congress. 134 S. Ct. at 2030, 2037–38.

Among the important considerations in that legislative examination would be whether to allow litigants to interfere with the trust-acquisition process established by Congress and the Executive to assist tribes in rebuilding their land holdings. *See* 25 U.S.C. § 5108. Actions claiming an interest in Indian lands will slow or halt trust-acquisitions by imposing "liens, encumbrances or infirmities." *See* 25 C.F.R. 151.13(b). Such actions could reverse the progress Indian tribes have made to rebuild tribal territory and self-sufficiency pursuant to the Indian Reorganization Act. *See South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798 (8th Cir. 2005) ("Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities."). Accordingly,

the proposed exception poses a substantial risk of interfering with current law.

Additionally, Congress could weigh the important differences between Indian tribes and other sovereigns. For example, when a state purchases land in another state, or a foreign nation purchases land in another nation, the land normally comprises a small fraction of the sovereign's land holdings. The exercise of local jurisdiction over the land to adjudicate interests and ownership does not meaningfully impact or diminish the sovereignty and holdings of the state and foreign sovereign. But all land that tribes acquire in fee within the United States will exist within the territory of one or more states. Especially for landless tribes (as the Upper Skagit was, *see* Pet. 6–7), property held in fee may comprise a significant portion of land holdings as tribes acquire property as part of the fee-to-trust acquisition process advanced by the Indian Reorganization Act, 25 U.S.C. § 5108.

Whether there is any merit to the Lundgrens' proposed exception is a matter of balancing the tribes' unique sovereign interests within the existing statutory and policy framework. This balancing is a legislative determination best made by Congress. The Quiet Title Act is instructive. When Congress waived the federal government's immunity, it limited that waiver in many ways—for example, by requiring that quiet-title actions be brought in federal court and providing the United States the option to pay compensation in lieu of surrendering ownership. 28 U.S.C. § 2409a(a)–(b); *see* Br. of United States as

Amicus Curiae (U.S. Br.) 31. The Court should "defer to the role Congress may wish to exercise in this important judgment." *Bay Mills*, 134 S. Ct. at 2037 (citation omitted).

III. An Immovable Property Exception to Tribal Sovereign Immunity Would Be Inconsistent with this Court's Settled Precedents and the Unique Nature of Tribes as Domestic Dependent Nations.

The Lundgrens' proposed exception is inconsistent with the legal and factual underpinnings of tribal sovereign immunity. The basic differences among tribes, states, and foreign nations warrant rejection of the proposed exception.

A. This Court's Precedents Foreclose an Immovable Property Exception to Tribal Sovereign Immunity.

The Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills*, 134 S. Ct. at 2030–31 (alteration in original) (quoting *Kiowa*, 523 U.S. at 756). And the Court has never imposed an exception to tribal sovereign immunity for disputes involving immovable property within a state's territory. Instead, the Court has repeatedly held that tribal sovereign immunity extends beyond the borders of reservation land and applies to disputes that arise on land fully subject to a state's

jurisdiction. *See, e.g.*, *id.* at 2034 ("[A] State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation."); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001) (recognizing tribes are not subject to suit for off-reservation commercial conduct absent congressional abrogation or waiver); *Kiowa*, 523 U.S. at 754 (recognizing "our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred" and declining to limit immunity to on-reservation activities); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 167–68, 172–73 (1977) (affirming tribal immunity for claims arising from off-reservation fishing).

The Lundgrens suggest that *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), bars immunity here because the Tribe—having acquired this land on the open market—has no "sovereign interests" at stake. Resp. 11–12, 32. This argument misses the essential holding of *City of Sherrill*, confusing the distinct issues of sovereign authority over land and sovereign immunity from suit. The Court in *City of Sherrill* rejected the Oneida Indian Nation's attempt to assert "sovereign authority to remove the land from local taxation." *Id.* at 215 n.9, 221. Sovereign authority (and the consequent immunity from local taxation) is entirely distinct from sovereign immunity from suit; only the former was at issue in *City of Sherrill*. *Id.* at 214. The Court has never limited tribes' sovereign immunity from suit to sovereign interests or sovereign land—as

is clear from the cases applying immunity to off-reservation, commercial activities.[1]

Bay Mills, *C & L Enterprises*, *Kiowa*, and *Puyallup* established that, when an Indian tribe acts outside reservation or trust land and within the territory of a state, it retains the full protection of sovereign immunity from suit unless Congress limits that immunity. Nothing changes that equation here. When the Tribe purchased land in fee adjacent to its trust and reservation lands, it retained its sovereign immunity from suit. The Lundgrens brought this action, choosing to name the Tribe as a defendant because the Tribe was the "record title holder" of the property, and for the very purpose of "reforming the . . . legal description[] of . . . Defendant's propert[y]." JA 12, 15; *see* CP 17 (property record). The Lundgrens decided that they needed to attack the Tribe's interest and secure recorded title in their name. Absent Congressional abrogation, the Tribe may invoke immunity to bar this action.

The Lundgrens seek to create an exception to the established principle that tribes retain their immunity from suit when acting outside reservation and trust lands. "But this Court does not overturn its precedents lightly. *Stare decisis* . . . 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

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[1] If *City of Sherrill* had any application to these proceedings, it would be in the Court's application of laches to long-dormant claims such as the Lundgrens' claim here.

contributes to the actual and perceived integrity of the judicial process.'" *Bay Mills*, 134 S. Ct. at 2036 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Carving out a new exception here would be particularly problematic because "*stare decisis* concerns are at their acme in cases involving property and contract rights." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). In reliance on this settled law, the Upper Skagit and other tribes have acquired land in fee outside the borders of their reservations and use that land to provide services and benefits for their members. Creating a new exception to tribal sovereign immunity for immovable property would undermine considerable investment and development undertaken by Indian tribes and have sweeping effects on tribal lands, resources, and governance across the country. Such a change cannot be justified absent an exceptionally compelling "special justification." *Bay Mills*, 134 S. Ct. at 2036 (citation omitted). The Lundgrens offer no such justification.

B. The Lundgrens' Analogies to States and Foreign Nations Ignore Basic Differences Bearing on the "Special Brand of Sovereignty the Tribes Retain."

The Lundgrens' reliance on the "immovable property" exception ignores the basic differences among Indian tribes, states, and foreign nations which the Court has repeatedly recognized as creating a "special brand of sovereignty the tribes retain—both its nature and its extent." *Bay Mills*, 134 S. Ct. at 2037.

As to states, this Court explained in *Kiowa* that "the immunity possessed by Indian tribes is not coextensive with that of the States," and, in some ways, the immunity enjoyed by tribes is broader. 523 U.S. at 756. *Contra* Resp. 27 (arguing that the immunity "should be narrower" than "that of other sovereigns"). In particular, the states surrendered their immunity from suits by sister states at the Constitutional Convention. 523 U.S. at 756. Indian tribes did not participate in the Convention and made no such concession. *Id.* Additionally, while "tribal immunity is a matter of federal law and is not subject to diminution by the States," *id.*, "one State's immunity from suit in the courts of another State is . . . a matter of comity," *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

This distinction explains why *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), is of no help to the Lundgrens. In *City of Chattanooga*, the Court held that the State of Georgia could not invoke its sovereign immunity from suit to bar the City's condemnation action regarding Georgia-owned land within Tennessee. *Id.* at 482. The Lundgrens contend that the fact that *City of Chattanooga* predated *Hall* suggests it rested on—but did not identify—an immovable property exception. Resp. 24–25. But *City of Chattanooga* rested on the same notion of "consent" by "a sister state," 264 U.S. at 479–80, as *Hall*. Indeed, the Court in *Hall* identified *City of Chattanooga* as an example of the principle it announced, that a state may make its own policy judgments about recognizing the immunity of other states in its courts. 440 U.S. at 426 n.29. And the

Lundgrens' claim that an (unidentified) "immovable property" exception underlay *City of Chattanooga* is belied by the Court's cabining of its holding in *City of Chattanooga* to "[t]he power of eminent domain," stressing, "we need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its . . . property in that state." 264 U.S. at 480, 482.

If anything, *City of Chattanooga* underscores how states differ from tribes. The case relied not on an "immovable property" exception but on Georgia's "[h]aving acquired land in another state for the purpose of using it in a private capacity"—that is, Georgia's commercial activity. *Id.* at 479; *see also id.* at 481 ("[Georgia's] enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation . . . ."). But this Court has repeatedly reaffirmed that there is no commercial activity exception to tribal sovereign immunity. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2031, 2036–37; *Kiowa*, 523 U.S. at 760; *Puyallup*, 433 U.S. at 167–68.

No less fundamental are the differences between tribes and foreign nations. As already explained, exceptions to foreign sovereign immunity are a matter of deference to the political branches. *See also* U.S. Br. at 29–31. And the political branches have limited that immunity in ways they have not yet seen fit to do with tribes' immunity. For example, pursuant to the "restrictive" theory of foreign sovereign immunity adopted by the State Department

in 1952 and Congress in 1976, foreign sovereigns are generally immune from suit in United States courts, but not immune from suits relating to commercial activity in the United States. *Verlinden B.V.*, 461 U.S. at 486–88; 28 U.S.C. § 1605(a)(2). In contrast, Indian tribes are immune from suits relating to commercial activity, even when that activity takes place off reservation lands. *Bay Mills*, 134 S. Ct. at 2031, 2036–37; *C & L Enters., Inc.*, 532 U.S. at 414; *Kiowa*, 523 U.S. at 760; *Puyallup*, 433 U.S. at 167–68.

The Court has recognized these differences, holding that tribes are "domestic dependent nations," retaining a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2030, 2037; *see also id.* at 2040 (Sotomayor, J., concurring) ("Indian Tribes have never historically been classified as 'foreign' governments in federal courts even when they asked to be."). The Court recognized these differences early in this nation's history. Chief Justice Marshall, writing for the Court in *Cherokee Nation v. Georgia*, stated:

> [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.
>
> The Indian territory is admitted to compose a part of the United States. . . .
>
> . . . [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United

> States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . . .
>
> . . .
>
> . . . But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."
>
> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.

30 U.S. (5 Pet.) 1, 16–18 (1831).

In light of tribes' distinct status, the Court should not undertake to limit tribal sovereign immunity by analogy to states and foreign nations. This Court has long viewed tribes' immunity as linked to the federal government's, explaining that the same "public policy . . . exempted the dependent as well as the dominant

sovereignties from suit without consent." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512, (1940); *see id.* ("It is as though the immunity which was [tribes'] as sovereigns passed to the United States for their benefit . . . ."). That is consistent with the Court's recognition that Indian tribes are "domestic dependent nations" of the federal government "under the 'tutelage' of the United States." *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *Cherokee Nation*, 30 U.S. at 17 and *Heckman v. United States*, 224 U.S. 413, 444 (1912)); *see also Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) ("[T]ribal sovereign immunity *is* deemed to be coextensive with the sovereign immunity of the United States." (citation omitted)). In this case, were the federal government the purchaser of the land at issue, there is no dispute that it would remain immune from suit absent waiver. Resp. 18.[2] It is for this reason that the Lundgrens' proposed rule—that tribes are subject to suit for property held in fee but not in trust—is not only a flawed legislative judgment,[3] it misconceives the nature and scope of the tribes' immunity from suit.

The Lundgrens cite no case—and the Tribe has found none—in which this Court has deemed tribal immunity from suit to be narrower than the United States' immunity. Of the examples the Lundgrens'

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[2] Congress declined to waive immunity as to suits based on adverse possession. 28 U.S.C. § 2409a(n).

[3] As described in Section II(B), *supra*, before land can be taken into trust, it must be acquired in fee. Litigants who oppose efforts to take tribal land into trust could readily sabotage the trust-acquisition process if land acquired in fee is subject to suit.

cite of limitations on tribal immunity, Resp. 25–26, only *Lewis*, 137 S. Ct. at 1290 (holding that suit could be maintained against individual), and *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986) (commenting that counterclaim alleging setoff would not violate immunity), involved immunity from suit. The limitations identified in each case have analogs in suits against the United States. *See Lewis*, 137 S. Ct. at 1290 ("Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit."); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) ("when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs"). The Lundgrens' other example, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that the state could seize contraband), again evidences the Lundgrens' conflation of sovereign authority with sovereign immunity from suit.

The concessions of federalism answer why the harms to state sovereignty the Lundgrens allege, Resp. 13–14, are legislative, rather than judicial, concerns. By ratifying the Constitution, states relinquished their "primeval interest in resolving all disputes over use or right to use real property," Resp. 14 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)); the federal government's immunity makes that impossible. More, the Supremacy Clause binds states

to federal law, including Congress's power over relations "with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3; *see id.* art. VI, cl. 2, making tribal immunity from suit "a matter of federal law and . . . not subject to diminution by the States." *Kiowa*, 523 U.S. at 752.

States' sovereignty is protected by the rule that Indian tribes and their members are normally "subject to any generally applicable state law" outside reservation boundaries. *Bay Mills*, 134 S. Ct. at 2034. But "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The fact that sovereign immunity may, in some instances, limit states' ability to adjudicate disputes within their territories has never justified judicially limiting tribal immunity from suit.

Nor, finally, does the Lundgrens' suggestion that they lack remedies they deem "adequate," Resp. 37, justify the result they seek. The Lundgrens chose not to pursue any remedy for over 40 years. They downplay the remedies available to them now—such as provoking a suit by the Tribe or individual-capacity suits against Tribe employees—as inefficient or incomplete. Resp. 40. But immunity often "bars . . . the most efficient remedy." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). Similar limited remedies existed for litigants asserting ownership of lands claimed by the United States until Congress narrowed federal immunity through the Quiet Title Act, but the change came through Congress, not the courts. *Block v. North Dakota ex rel. Bd. of Univ. &*

Sch. Lands, 461 U.S. 273, 280–81 (1983). The Lundgrens question whether Washington law would recognize a damages actions against the seller, Resp. 39, but they cite no case that has considered similar facts, and other jurisdictions have expressly allowed such actions.[4] The Court should not entertain their request for a new exception to sovereign immunity based on speculation that the state's remedies might be inadequate, when limitations to tribal immunity from suit remain a matter for Congress.

The Lundgrens chose not to seek to test their claim to title for decades. Then, after the Tribe purchased the property and became its recorded owner, the Lundgrens chose to sue to eradicate the Tribe's interest—that action is barred by sovereign immunity.

IV. Having Sought to Adjudicate the Tribe's Interest in the Property, the Lundgrens' Suit Should Have Been Dismissed for Lack of Jurisdiction.

As "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), Indian tribes retain sovereign immunity from suit in the absence of waiver or

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[4] *See, e.g., In re B & L Oil Co.*, 46 B.R. 731, 736 (Bankr. D. Colo. 1985) ("It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability if in equity and good conscience, he is not entitled to hold it against the true owner." (quoting *Empire Oil Co. v. Lynch*, 126 S.E.2d 478, 479 (Ga. Ct. App. 1962), and citing cases from Minnesota and Kentucky)).

congressional abrogation, *Bay Mills*, 134 S. Ct. at 2028.

When a litigant brings an action targeting an Indian tribe's interest in real property, the tribe need not prove its ownership or disprove the adverse litigant's claim before invoking sovereign immunity from suit; the tribe need only establish it has a non-frivolous interest. *Cf. Republic of the Philippines v. Pimentel*, 553 U.S. 851, 864, 867 (2008) (holding that sovereign with non-frivolous claim may bar adjudication of interpleader action). Once the tribe does so, the action must be dismissed for lack of jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

The Lundgrens brought an action to adjudicate the Tribe's interest in certain property. Their complaint named the Tribe as the defendant, conceded that the Tribe is record owner of the property, and asked the Court to order that the Tribe's name be removed from the governmental property records, confirming the Tribe's interest is non-frivolous. JA 12, 15; CP 17. The Tribe had the right to invoke its sovereign immunity from suit and prevent the court from exercising jurisdiction. *See Lewis*, 137 S. Ct. at 1291 (holding that tribal sovereign immunity was not implicated because lawsuit "will not require action by the sovereign or disturb the sovereign's property" (citation omitted)). The Washington courts erred by failing to give effect to the Tribe's immunity from suit and instead adjudicating the Tribe's interests on the merits.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

Arthur W. Harrigan, Jr.
Counsel of Record
Tyler L. Farmer
Kristin E. Ballinger
John C. Burzynski
Harrigan Leyh Farmer &
Thomsen LLP
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700
arthurh@harriganleyh.com

David S. Hawkins
General Counsel
Upper Skagit Indian Tribe
25944 Community Pl. Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com

Counsel for Petitioner

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